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this Memorandum Decision shall not be  
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establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT E. STANLEY,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 18A05-0509-CR-512

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APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Robert L. Barnet, Judge  
Cause No. 18C03-0503-FD-14 and  
18C03-0503-FD-15

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**August 29, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Robert E. Stanley (Stanley) appeals the sentence imposed by the trial court upon his pleading guilty to theft as a class D felony and possession of a controlled substance as a class D felony.

We affirm.

## ISSUE

Whether the trial court erred in identifying and weighing aggravating and mitigating factors when it sentenced Stanley.

## FACTS

On January 14, 2005, Stanley was charged with one count of resisting law enforcement, as a class A misdemeanor, and one count of possession of a controlled substance, as a class D felony. On February 14, 2005, Stanley was charged with one count of theft, as a class D felony, and one count of being an Habitual Offender. On April 20, 2005, Stanley, by counsel, filed a plea agreement in the trial court; the agreement between Stanley and the State was that Stanley would plead guilty to theft, as a class D felony, under cause number 18C03-0503-FD-14, and possession of a controlled substance, as a class D felony, under cause number 18C03-0503-FD-15. Pursuant to the agreement, the State dismissed all other charges under both cause numbers and the entire case of 18C03-0411-FD-140, in which, the charges were “Theft and Habitual Offender.” (Tr. 2). Sentencing was left to the discretion of the trial court.

On July 21, 2005, a sentencing hearing was conducted. Stanley presented evidence through witnesses that testified as to his good conduct while incarcerated. One witness, Dr. Frank H. Krause, a Delaware County Jail psychologist, testified as to what

Stanley had shared with him about his past drug abuse. Stanley testified about his history of drug abuse and stated that his addiction was the reason he committed crimes.

After hearing evidence and counsels' arguments and reviewing the pre-sentence investigation, the trial court found:

Aggravating circumstances the Court's considered, history of contact with the legal system, three (3) felony convictions, ten (10) misdemeanor convictions. Felonies for Theft, Home Improvement Fraud, Theft from an Elderly Person. The court notes among the misdemeanor convictions are two (2) other Home Improvement Fraud convictions. The Court notes a pattern of offenses involving Home Improvement Fraud. The Court notes the age of the victim here being eighty-three (83). Apparently, what I've learned from the probation report also, other probation, other restitutions have been ordered which have not been paid. Obviously, a certain amount of planning, premeditation, went into this crime. Defendant has been on probation five (5) times, all unsuccessful. There has been a prior Department of Corrections [sic] commitment. So we know that prior attempts at rehabilitation, Mr. Stanley, have not been successful because we're here today. The Court's considered both the aggravating and the mitigating circumstances. Be the judgment of the Court as to, as follows: On the Theft conviction, a class D felony, Defendant will be committed to the custody of the Department of Corrections [sic] for a period of three (3) years . . . On the Possession of a Controlled Substance offense, class D felony, Defendant will be committed to the custody of the Department of Corrections [sic] for a period of one (1) year. The court having considered both offenses, having considered the following aggravating circumstances here: the Court's considered the history of contact with the legal system, a long extensive history of contact, three (3) felonies, ten (10) misdemeanors; the Court's considered the age of the victim; the Court's considered the fact this Defendant has been on probation five (5) times; find the sentence imposed in Possession of a Controlled Substance shall be served consecutive to the sentence imposed in the Theft conviction, and by statute, these sentences must be served consecutive to the sentence imposed in Bartholomew County under cause 1240.

(Tr. 57-58). Stanley appeals the sentence.

## DECISION

Stanley argues that the trial court erred in sentencing him. Specifically, he posits that when the trial court engaged in weighing aggravating and mitigating factors, it failed to mention Stanley's drug addiction, evidence of which Stanley believes was clearly supported by the record. Therefore, Stanley asserts that this court can safely infer that the trial court improperly overlooked it as a mitigating factor. We disagree.

Sentencing decisions are generally within the trial court's discretion and will be reversed only for an abuse of discretion. Dixon v. State, 825 N.E.2d 1269, 1272 (Ind. Ct. App. 2005), trans. denied. In order to reduce or increase a presumptive sentence,<sup>1</sup> the trial court must consider aggravating and mitigating factors. I.C. § 35-38-1-7.1. The presumptive sentence for a D felony is one year and a half. Ind. Code § 35-50-2-7. Aggravating factors can add a year and a half to the presumptive sentence, and mitigating factors can reduce said sentence to six months. Id. A person convicted of an A misdemeanor may be "imprisoned for a fixed term of not more than one (1) year." I.C. § 35-50-3-2.

A trial court's sentencing statement must (1) identify significant aggravating or mitigating circumstances, (2) state the specific reason why each circumstance is aggravating or mitigating, and (3) demonstrate that the factors have been weighed and balanced before deciding whether the aggravators outweigh the mitigators. Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied. The trial court must

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<sup>1</sup> After Stanley committed the offenses for which he was convicted, and before he was sentenced, Indiana Code section 35-50-2-1.3 (2005) was amended to provide for an "advisory" rather than "presumptive" sentence. Another panel of this court recently held that the change constituted a substantive rather than procedural change that should not be applied retroactively. Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied.

consider all evidence of mitigating circumstances offered by the defendant; however, the finding of a mitigating factor rests within the trial court's discretion. Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002). We will not find an abuse of discretion where a defendant's proffered mitigating factor is "highly disputable in nature, weight, or significance." Id. In contrast, a trial court failing "to find mitigating circumstances clearly supported by the record may imply that the sentencing court improperly overlooked them. Id. However, "the court is obligated neither to credit mitigating circumstances in the same manner as would the defendant, nor to explain why he or she has chosen not to find mitigating circumstances." Id.

Stanley's argument that his offer of evidence to the trial court that his drug addiction should be considered as a mitigating factor, is "clearly supported by the record," does not hold up upon review. First, Stanley presented the testimony of Dr. Krause, who testified that Stanley had informed him of his drug abuse. Dr. Krause testified that "we offer several programs, but [Stanley] has attended church, he's also attended what we call Life Skills, which is a, a class that meets on a weekly basis. He has attended those on a regular basis." (Tr. 30). This testimony reasonably suggests that Stanley did not avail himself of substance abuse treatment. Next, Stanley testified that his motivation to commit crimes was drugs, and he explained the extent of his addiction by sharing that once, when his wife left their home for a weekend, he had sold all of their household belongings at very low cost in an effort to obtain drugs. He further testified that he had admitted himself to St. Vincent's Hospital for drug treatment but left after two days because he could not afford it. Stanley also testified that he had struggled with

substance abuse since the age of 14. Conspicuously missing from Stanley's proffered mitigator is any evidence of his participation in substance abuse treatment during the three times he was on probation or while he was incarcerated in the Department of Correction. We find Stanley's proffered evidence of his drug addiction as a mitigating factor "highly disputable in nature, weight, or significance." Henderson, 769 N.E.2d at 179. Therefore, the trial court did not err when it did not consider it as a mitigating factor.

We affirm.

RILEY, J., and VAIDIK, J., concur.